

**OCCUPATIONAL SAFETY
AND HEALTH STANDARDS BOARD**

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Website address www.dir.ca.gov/oshsb**PROPOSED DECISION OF THE OCCUPATIONAL SAFETY AND
HEALTH STANDARDS BOARD REGARDING PETITION FILE NO. 520****INTRODUCTION**

Boyd Jensen (petitioner) submitted to the Occupational Safety and Health Standards Board (Board) a letter dated December 8, 2010 accompanied by many attachments. Those documents constitute Petition 520. The petitioner, an attorney with Garrett & Jensen, states in the December 8 letter that the petition is filed on behalf of several members of the California Portable Ride Operators LLC. The petition recommends that the Board add a new Section 3921 to Title 8 of the California Code of Regulations. That new provision would establish criteria for the certification of "insurance or public entity portable amusement ride" inspectors and would add specificity as to what the inspections are to encompass.

SUMMARY

According to the petitioner, the only inspectors that currently are authorized by the Division of Occupational Safety and Health (Division) to perform the portable amusement ride inspections required by Labor Code Section 7905 are Division employees. The petitioner asserts that better and cheaper inspections could be done by others, such as independent contractors retained by insurance companies to perform such inspections for insurance purposes. The petitioner states words to the effect that the Division's narrow interpretation of the term "employed by" in Section 7905 has been the impediment to the use of the insurance company contract inspectors. There is no relevant national consensus standard, nor is there any equivalent federal standard regarding this matter.

DIVISION EVALUATION

The Division cites the legal authority discussed in the "Board Staff Evaluation" portion of this proposed decision and states that "it may be necessary to adopt new regulations or amend existing regulations" concerning these portable amusement ride inspections.

BOARD STAFF EVALUATION

The key issue is the meaning of the words "employed by" in Labor Code Section 7905. That statute reads as follows:

The division may hire inspectors to inspect amusement rides. The division shall cause the inspection provided by this part to be made by its safety inspectors, or by a qualified inspector who is approved by the division and employed by an insurance company or a public entity.

The petitioner has indicated that the Division does not consider independent contractors to be employees within the meaning of the statute. If that reading of “employed by” is correct, the portion of the petition having to do with the certification of insurance company contractors to perform the inspections must be denied, since the Board may not promulgate regulations that are contrary to a statute.

That narrow reading of “employed by” is not correct, however. The Court of Appeal in National Elevator Services v. Department of Industrial Relations (1982), 136 Cal. App. 3d 131, considered the meaning of a Labor Code provision governing elevator inspectors. That Labor Code provision, Section 7309, reads as follows: “The division may cause the inspection herein provided for to be made either by its safety inspectors or by any qualified elevator inspector employed by an insurance company.”

The central issue in National Elevator Services was whether an insurance company independent contractor inspector was “employed by” the insurance company within the meaning of Section 7309, and the court answered that question affirmatively. In view of the striking similarity between the quoted portion of Section 7309 and the wording of Section 7905, the court’s holding regarding the meaning of the term “employed by” in Section 7309 provides guidance for the meaning of those words in Section 7905.

Accordingly, it is correct to conclude that an insurance company independent contractor amusement ride inspector is “employed by” the insurance company within the meaning of Section 7905. Therefore, the portion of the petition that concerns the certification of such inspectors is not contrary to statute and need not be denied on that basis.

Another statute of importance is Labor Code Section 7902, which states in part that “The division shall promulgate and formulate rules and regulations for adoption by the Occupational Safety and Health Standards Board for the...inspection of all amusement rides as the division finds necessary for the protection of the general public using amusement rides.” In other words, the formulation of any regulatory proposal derived from Petition 520 is a task for the Division and not the Board. As a result, any evaluation of the merits of the petitioner’s ideas is for Division staff and not Board staff.

DECISION AND ORDER

In view of the points made above with respect to the Division and Board staff evaluations, the Board grants Petition No. 520 to the extent that this matter is referred to the Division for the formulation of such rulemaking proposals as the Division deems appropriate.